

Supreme Court, U. S.  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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**No. 77-450**

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LARRY PRESSLER,  
Member, House of Representatives, *Appellant*,

v.

W. MICHAEL BLUMENTHAL,  
Secretary of the Treasury;

J. S. KIMMITT,  
Secretary of the United States Senate;

KENNETH R. HARDING,  
Sergeant-at-Arms of the United  
States House of Representatives, *Appellees*.

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On Appeal from the United States District Court  
for the District of Columbia

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**MOTION OF APPELLEE J. S. KIMMITT,  
SECRETARY OF THE UNITED STATES SENATE,  
TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM**

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**MOTION OF APPELLEE J. S. KIMMITT,  
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TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM**

Appellee J. S. Kimmitt, Secretary of the United States Senate, respectfully moves this Court to dismiss the appeal, or in the alternative, to affirm the judgment of the United States District Court for the District of Columbia. Sup. Ct. R. 16(1)(c) and (d).

### OPINION BELOW

The order of the three-judge district court from which this appeal is taken is reproduced in the Jurisdictional Statement Appendix ("J.S. App.") at 1a-2a. It is not yet reported. The order appealed from reinstated a prior memorandum opinion and order by the three-judge court (J.S. App. 3a-10a) which is reported *sub nom. Pressler v. Simon, et al.*, 428 F.Supp. 302 (D.D.C. 1976).

### JURISDICTION

The judgment of the three-judge district court reinstating its prior opinion and order was entered on July 19, 1977, following a remand of this case to the district court by this Court on May 16, 1977 for further consideration in the light of new legislation (J.S. App. 22a). A notice of appeal to this Court from the July 19, 1977 order (J.S. App. 24a-26a) was filed on August 2, 1977. The jurisdictional statement was filed on September 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

### QUESTIONS PRESENTED

1. Whether the appellant, in his capacity as a Member of Congress, has standing to challenge the constitutionality of the procedures established in the Federal Salary Act of 1967 and in the Executive Salary Cost-of-Living Adjustment Act of 1975 for ascertaining the compensation to be received by Senators and Representatives.

2. Whether, even if appellant has standing as a Member of Congress, his challenge to the statutory procedures selected by Congress for determining congressional compensation pursuant to Article I, Sections 1,

6, and 8 should be treated as a nonjusticiable political question that has been committed by the Constitution to the Congress.

3. Whether statutory procedures which were established by Congress in the Federal Salary Act of 1967 and the Executive Salary Cost-of-Living Act of 1975 as the method for ascertaining compensation for Senators and Representatives, and which preserve the right of either House of Congress to reject pay adjustment recommendations submitted by the President are constitutionally permissible as an exercise of Congress' discretion under the "necessary and proper" clause, Article I, Section 8 for carrying into execution the power vested in it by Article I, Section 6 to ascertain by law the compensation of Senators and Representatives.

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 1 of the Constitution provides:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 6 of the Constitution provides, in pertinent part:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.

Article I, Section 8 of the Constitution provides, in pertinent part, that:

The Congress shall have power . . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all others Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Federal Salary Act of 1967 (the "Salary Act") is Title II of the Postal Revenue and Salary Act of 1967. Section 225 of the Salary Act, 2 U.S.C. §§ 351-361, is set forth at J.S. App. 27a-32a and the amendment to section 225(i), 2 U.S.C. § 359(1) (the "Bartlett Amendment"), is set forth in the jurisdictional statement ("J.S.") at J.S. 5. The Bartlett Amendment was adopted on April 4, 1977, subsequent to the original decision of the three-judge court in this case on October 12, 1976. Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975 (the "Adjustment Act"), 2 U.S.C. § 31, is set forth in pertinent part at J.S. 5-6.

#### STATEMENT

The appellant, in his capacity as a citizen, taxpayer, and Member of the House of Representatives (*see* J.S. App. 12a), challenges in this action the constitutionality of the provisions in the Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. §§ 351-361 ("Salary Act"), and Sections 2 and 3 of the Executive Salary Cost-of-Living Adjustment Act of 1975, 89 Stat. 421, 2 U.S.C. § 31 ("Adjustment Act"), which establish the procedures for ascertaining adjustments in the compensation of Members of Congress. He asserts that these statutes violate Article I, Sections 1 and 6 of the Constitution.

#### The Salary Act

The first of these statutes, the Salary Act, established a Commission on Executive, Legislative, and Judicial

Salaries ("The Commission") which is appointed every fourth fiscal year and directed (a) to conduct a review of the rates of pay of Members of Congress, federal judges, and higher level positions in the executive, legislative, and judicial branches and (b) to submit to the President a report of such review together with its recommendations as to salaries for such positions. The Salary Act expressly provides that the review by the Commission is to be made to determine (i) the appropriate pay levels and relationships between and among the respective congressional, judicial and executive positions covered by the statute, and (ii) the appropriate pay relationships between such offices and positions and the offices and positions covered by the General Schedule pay rates (2 U.S.C. § 356, J.S. App. 29a-30a).

After the President receives the report and recommendations of the Commission, he is required to include in the next budget transmitted by him to Congress his recommendations with respect to the exact rates of pay he deems advisable for those offices and positions (2 U.S.C. § 357, J.S. App. 30a). These recommendations are then subject to review by both Houses of Congress and all or part of the recommendations for any pay adjustments can be specifically disapproved by either House. To the extent that neither House disapproves the recommended rates of pay, the statute provided prior to the Bartlett Amendment that they became the effective rates of pay at the beginning of the first pay period which began 30 days after the recommendations were submitted to Congress, unless Congress superseded the effectiveness of such rates of pay by adopting a statute providing for different rates of pay (2 U.S.C. § 359, J.S. App. 31a).

The amendment to Section 225(i) of the Salary Act, known as the Bartlett Amendment, provides the express procedure by which each House must act upon the President's recommendations for changes in rates of pay. Under that procedure, each House is required to conduct a separate vote on each of the President's recommendations within 60 calendar days of the submission of those recommendations to Congress, and by such vote approve or disapprove each recommendation. The votes are required to be recorded so as to reflect the vote of each individual Member. Only if both Houses approve by majority vote the President's recommendations for changes in the rates of pay do such recommendations become effective (2 U.S.C. § 359(1), J.S. 5). Thus, both before and after the Bartlett Amendment, either House could reject all or any particular changes in the pay rates recommended by the President and leave the existing rates of pay in effect.

The first quadrennial pay adjustment under the Salary Act increasing the salaries of Members of Congress, judges and higher level executive, judicial and legislative branch positions became effective February 15, 1969. *See* 34 Fed. Reg. 2241 (1969). The recommendation for the second quadrennial pay adjustment was disapproved by the Senate on March 6, 1974. S. Res. 293, 93rd Cong., 2d Sess., 120 CONG. REC. 5492 (1974). The recommendations for pay increases under the third quadrennial adjustment became effective February 17, 1977. *See* 42 Fed. Reg. 10297 (1977). Shortly thereafter, on April 4, 1977, the Bartlett Amendment establishing the express procedure for congressional action on Presidential pay adjustment recommendations was adopted. (Pub. L. No. 95-19, 91 Stat. 45). The only increase in congressional pay under the Salary Act which took place while appellant has

been a Member of Congress<sup>1</sup> was the third quadrennial adjustment.

#### The Adjustment Act

In order to keep the pay adjustments covered by the quadrennial adjustment plan of the Salary Act from lagging behind the pay of federal employees covered by the General Schedule, Congress, in 1975, also enacted the Adjustment Act (J.S. 5-6) to provide a statutory procedure for an automatic annual cost-of-living adjustment in salaries of Members of Congress, federal judges, and higher level executive, judicial, and legislative officials equal to the average percentage increase made each year in the rates of pay of federal employees covered by the General Schedule under the provisions of the Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 5 U.S.C. §§ 5305-5312. If the President considers it inappropriate because of national emergency or economic conditions to make the pay adjustments mandated by the Adjustment Act, he is directed by the statute to prepare and transmit to Congress a plan of alternative recommendations. If the President's alternative plan is rejected by either House of Congress, the statute requires that the mandatory increase automatically becomes effective.

The Adjustment Act was adopted over appellant's dissenting vote in 1975. (121 CONG. REC. 25841 (1975)). The mandatory salary increases provided by that Act became effective automatically in 1975 and 1976, the President having submitted no alternative plans for consideration by Congress. Congress, however, declined to appropriate funds to pay the 1976 increase. Con-

<sup>1</sup> Appellant became a Member of the House of Representatives January 3, 1975.

gress also, by Pub. L. No. 95-66, 91 Stat. 270, enacted July 11, 1977, specifically provided that there would be no annual pay adjustment in 1977 under that Act. Appellant voted against the payment of the automatic increases in both instances in recorded votes. (122 CONG. REC. H9394-5 (daily ed. Sept. 1, 1976), and 123 CONG. REC. H6592 (daily ed. June 28, 1977), respectively).

#### The Proceedings Below

Appellant asserts that insofar as the Salary Act and the Adjustment Act establish procedures for changes in congressional pay they are repugnant to Article I, Section 6 of the Constitution which requires the compensation of Senators and Representatives "... to be ascertained by law" and to Article I, Section 1 of the Constitution which provides that all legislative powers "... shall be vested in the Congress of the United States which shall consist of a Senate and House of Representatives." (Complaint, ¶¶ 13 and 22; J.S. App. 14a and 17a). He claims that the defendants have injured him as a citizen by depriving him of the right to have Members of Congress accountable for increases authorized in their compensation (Complaint ¶¶ 14, 23); that they have injured him as a taxpayer by depriving him of the right to have tax monies expended pursuant to laws (Complaint ¶¶ 15, 24); and that they have injured him as a Member of the House of Representatives by interfering with the performance of his constitutional responsibilities and congressional duties and by depriving him of his right to vote on each salary adjustment (Complaint ¶¶ 16, 25).

A three-judge district court was convened pursuant to 28 U.S.C. §§ 2282 and 2284. Appellant moved for summary judgment and appellees filed cross motions

for summary judgment and a motion to dismiss the appellant's complaint. The three-judge district court in a memorandum opinion and order (J.S. App. 3a-10a) rejected appellant's claim of citizen and taxpayer standing, granted his claim of standing as a Member of Congress, sustained the constitutionality of the statutes in question, granted summary judgment to appellees, and dismissed the complaint (J.S. 3).

In its opinion, the three-judge district court concluded that while appellant's theory of injury "is somewhat unclear" (J.S. App. 7a), he was not injured as a Member of Congress by the challenged procedure when a proposed salary increase under the Salary Act was rejected because the status quo was unaltered. However, the court concluded, he was injured as a Member of Congress by the October 1975 automatic salary increase under the Adjustment Act procedure because it required the same percentage increase in pay for the positions covered by that Act as for positions covered by the General Schedule without further vote by either House. And since the Adjustment Act increases on a percentage basis the compensation determined under the Salary Act, the court concluded that appellant, therefore, had standing to challenge both Acts.

On the merits of the case, the three-judge court held that in enacting the Salary Act and the Adjustment Act, Congress had established its compensation "by law" within the requirements of Article I, Section 6 of the Constitution and that the statutory schemes selected by the Congress in such statutes do not contravene the Constitution. The court noted that when the President submits recommendations, either House, acting alone, can by negative vote prevent the recom-

mendations from taking effect and leave in effect the existing compensation levels provided by statute. The court found that "a reasonable effort to coordinate congressional pay with pay in the Executive and Judicial branches was certainly not intended to be foreclosed by the ascertainment clause" and that "Congress must always account to the people for what it pays itself." Finally, the court concluded that our constitutional system places reliance on the checks and balances built into our tripartite format and the sound attitude of voters expected at the polls, and that the "necessary and proper" clause "is but one expression of this sound approach." (J.S. App. 10a).

This opinion and order was reinstated by the district court following remand of the case to it by this Court for further consideration in the light of the Bartlett Amendment. The court concluded that amendment did not affect the plaintiff's claims that the 1969 and 1977 Salary Act adjustments and the Adjustment Act procedures are inconsistent with Article I, Section 6, or the court's prior decision that such procedures fixed congressional compensation by law; were not prohibited by Article I, Section 6; and did not contravene the Constitution.

## ARGUMENT

### I. MOTION TO DISMISS

Appellee Kimmitt hereby moves to dismiss the appeal on the ground that no justiciable case or controversy exists within the meaning of Article III of the Constitution because (1) the appellant lacks standing to bring this appeal and (2) the appeal presents questions which are political in nature and, therefore, beyond the scope of judicial review. Either the absence of standing or the presence of a political question suf-

fices to prevent the power of the judiciary from being invoked by the complaining party. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215 (1974); *Powell v. McCormack*, 395 U.S. 486, 516-17 (1969).

### A. The Appellant Lacks Standing to Bring This Appeal

While appellant's jurisdictional statement is silent with respect to his standing, this is, nevertheless, a threshold question for consideration by this Court. *Buckley v. Valeo*, 424 U.S. 1, 11 (1976); *Roe v. Wade*, 410 U.S. 113, 125 (1973).

In his complaint, appellant asserted standing in his capacity as a citizen, as a taxpayer, and as a Member of the House of Representatives. The district court correctly concluded that the appellant lacked standing in his capacity as a citizen and as a taxpayer. *Richardson v. Kennedy*, 401 U.S. 901 (1971), *aff'd* 313 F.Supp. 1282 (W.D.Pa. 1970) (a challenge to the Salary Act by a citizen and taxpayer). The injuries which appellant asserts in his complaint as a citizen and as a taxpayer (Complaint ¶¶ 14, 15, 23 and 24) are nothing more than the assertion of a "generalized grievance" common to all or a large class of citizens and taxpayers in substantially equal measure and, thus, not the type of injury required to invoke the jurisdiction of a federal court. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

The appellant also lacks standing to bring this appeal in his capacity as a Member of Congress. His complaint is that the *defendants* have injured and will continue to injure him as a Member of Congress by interfering with the performance of his constitutional responsibilities and congressional duties and "by de-

priving him of his constitutional right to vote on each adjustment proposed in congressional salaries" (Complaint ¶¶ 16, 25, J.S. App. 15a, 18a). Certainly, neither the Secretary of the Treasury nor the Secretary of the Senate or Sergeant-at-Arms of the House in their capacities as salary disbursing officials, can be said to have interfered with appellant's performance of his constitutional responsibilities and duties or to have deprived him of the right to vote. At best, as reframed by the court below, appellant's complaint is directed against his colleagues who before and after appellant became a Member of Congress adopted the statutory schemes for ascertaining legislative, judicial and executive branch rates of pay without further legislative action being required unless and until superseded by another statute. Thus, appellant claims, in effect, that he has standing, as a Member of Congress, to request that the judicial branch inject itself into the legislative branch decision-making process.

In any event, under these statutory schemes, appellant's rights as a Member of Congress are preserved to him. As a Member of the House of Representatives, appellant was not, and is not, denied the right to introduce legislation which would specifically disapprove of all or part of the President's recommendations under the Salary Act. The Adjustment Act was adopted over appellant's dissenting vote in 1975. Appellant could also always vote against the appropriation of funds to pay the salaries, and in record votes, he voted against the disbursement of monies for the automatic pay increase in 1976 as well as against the automatic pay increase which would otherwise have been placed in effect in 1977. Thus, appellant's constitutional rights as a Member of Congress to introduce legisla-

tion and vote have been preserved to him and in fact exercised by him. His success in exercising those rights, however, has depended upon his ability to attract the support of other Members of Congress for his position. Simply stated, appellant has not been able to persuade his colleagues in all instances that his view should be adopted. Thus, in this action, he is not seeking, as a Member of the House to redress an injury *to* the body of which he is a part, but, instead, to complain about the acts of that body with which he disagrees. Appellant may be frustrated by his lack of ability to prevail, but he was not and is not prevented from performing his legislative duty.

Furthermore, many statutes of a permanent nature could be attacked on the basis of appellant's rationale that his right to vote has been denied because they authorize future actions which can be taken without further legislative approval until Congress amends or repeals the legislation. For example, a continuing authorization or permanent indefinite appropriation<sup>2</sup> deprives a Member of Congress of the right to vote thereafter on such uses of the public monies unless he can persuade his colleagues to change the previously adopted procedure, notwithstanding the requirement

<sup>2</sup> See, e.g., 31 U.S.C. § 711, which provides in part:

There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes specified in this section, such sums as may be necessary for the same, respectively; and such appropriations shall be deemed permanent annual appropriations.

2. Interest on public debt. For payment of interest on the public debt, under the several Acts authorizing the same.

in Article I, Section 9, that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

Appellant's disagreement with a statutory scheme adopted by Congress does not provide him with the requisite standing to challenge the statute in his capacity as a Congressman. *Harrington v. Bush*, 553 F.2d 190 (D.C.Cir. 1977); *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975); *Korioth v. Briscoe*, 523 F.2d 1271 (5th Cir. 1975); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). These cases in which the plaintiff was held to have no standing to complain against the legislative acts of his colleagues may be sharply distinguished from *Coleman v. Miller*, 307 U.S. 433 (1939), and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), in which legislators were found to have standing to complain that the effectiveness of their votes had been diminished by illegal interference from *non-legislative* sources.<sup>3</sup>

Furthermore, the fact that Congress in the Salary Act and the Adjustment Act departed from the previously established congressional pattern of dealing *ad hoc* with federal pay adjustments from time to time and provided a mechanism pursuant to which pay rates

<sup>3</sup> In *Coleman*, state legislators were held to have standing to complain that the lieutenant governor, who they asserted was not a part of the legislature for that purpose, had, in violation of the Constitution, cast a tie-breaking vote in the State senate in favor of a measure, thereby denying the effectiveness of the votes of the legislators who had voted against the measure. In *Kennedy*, Senator Kennedy was held to have standing to bring an action for a declaratory judgment that an Act for which he had voted became law notwithstanding the exercise by the President of a legally invalid "pocket veto."

for federal employees are adjusted,<sup>4</sup> neither removed the control over the amount of such salaries from Congress nor provides appellant with requisite personal injury required to establish standing. The amount of such salaries remains subject to congressional control in at least three ways. First, under both the Salary Act and the Adjustment Act the President's recommendations concerning rates of pay can be rejected by either House (J.S. 5, 12). Second, the authorized rates of pay determined pursuant to both statutes also always remain subject to subsequent legislation amending or repealing such procedures or authorizing other methods of determining federal pay levels. And third, federal pay, however ascertained, remains subject to further congressional action appropriating funds therefor.

Under these circumstances, appellant has neither the "personal stake" in the outcome of the controversy nor the requisite injury necessary to meet the requirements of Article III in order to bring this action as a Member of Congress. See *Baker v. Carr*, 369 U.S. 186, 204 (1962).

#### B. The Issue Presented by Appellant Is a Nonjusticiable Political Question

This appeal involves the methods chosen by Congress<sup>5</sup> in the Salary Act and the Adjustment Act to

<sup>4</sup> See *National Treasury Employees v. Nixon*, 492 F.2d 587, 592 (D.C.Cir. 1974) (involving a related statute).

<sup>5</sup> Appellant characterizes the Question Presented as follows:

Whether the methods of determining salary rates for Senators and Representatives under Section 225 of the Postal Revenue and Salary Act of 1967 and Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975 violate Article I, Sections 1 and 6 of the Constitution because they authorize changes in compensation for members of Congress without a direct vote by either House of Congress. (J.S. 4) (emphasis added).

ascertain congressional compensation. One of the tests to determine if this issue involves a political question is whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. at 217. Both Article I, Section 6 of the Constitution, which provides that "Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law," and Article I, Section 8, which vests in Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution" powers vested in Congress and the other powers vested in the Government of the United States, clearly demonstrate that the issue of congressional compensation is committed by the Constitution to Congress itself. The ratification debates cited by the appellant (J.S. 18-19) further confirm the textual commitment of this issue to the legislative branch.

Appellant's own arguments make it apparent that the issue he presents in this appeal is a political question. He argues that Congressional salaries must be fixed by Congress without any legislative involvement by the President (J.S. 22), that the public accountability of Members of Congress through the reelection process is a sufficient check on congressional enactment of excessive salaries (J.S. 20), and that the voters must be able to know how their Senators and Representatives stand on the amount of congressional compensation (J.S. 25). By their very statement such arguments characterize the issue as a political question within the province of the Congress under Article I, Section 1 of the Constitution. Moreover, the Bartlett Amendment which provides for the recording of the votes of each individual Member to approve or disapprove the rec-

ommended rates of compensation submitted by the President also reflects that this issue is a matter to be resolved by the Members of Congress and their constituencies, who ultimately must be satisfied as to the method chosen for ascertaining congressional compensation and its amount.

The language of this Court in *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), is clearly applicable to this situation: "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the judicial branch is not—to the electoral process." Given the constitutional debates, the ratification debates, and the express language of the Constitution itself, appellant's attack upon the action of Congress in providing by law for the ascertainment of the compensation of Senators and Representatives by the same method that the compensation of judges and higher level executive, legislative and judicial branch compensation is ascertained clearly raises a political question which this Court need not entertain.

## II. MOTION TO AFFIRM

Alternatively, appellee Kimmitt moves this Court to affirm the judgment of the three-judge district court. In Part II of its opinion the court below held that the Salary Act and the Adjustment Act "fix congressional compensation by law," that "these statutes are not prohibited by Article I, Section 6," and that "[n]either of these Acts insofar as they govern ascertainment of congressional compensation contravene the Constitution" (J.S. App. 10a). The court below is correct and should be affirmed.

**A. The Challenged Statutes Ascertain Congressional Compensation "By Law" and Are Not Prohibited by Article I, Section 6**

The three-judge district court correctly rejected appellant's argument that the Salary Act and the Adjustment Act do not constitute the ascertainment of congressional compensation "by law." The Salary Act and the Adjustment Act are clearly statutes which establish congressional compensation within the meaning of Article I, Section 6, and the court below pointed out that the appellant himself conceded that when Congress passed the Acts governing its compensation, it acted "by law" (J.S. App. 8a).

Appellant's entire argument hinges on a very narrow interpretation of "ascertained"—that it *must* be a specific *dollar* amount. The three-judge court also correctly and unanimously rejected this argument. Article I, Section 8 vests in Congress the power to make all laws which shall be necessary and proper for carrying into execution any of the powers vested in Congress or in the Government of the United States by the Constitution. Article I, Section 6 does not limit the manner or methods which Congress may select as being "necessary and proper" for carrying into execution its power to ascertain congressional compensation, except that it must be "by law."

Furthermore, Madison, in explaining and defending Article I, Section 6 in the Virginia ratification debate quoted by appellant (J.S. 18), expressly suggested the need to provide for the adjustment of congressional salaries to meet "the gradual diminution of the value of all coins and circulating medium" as one reason against ascertaining such salaries "immutably." The need he foresaw was to become the basis for the action by Congress to select methods in the Salary Act and

the Adjustment Act which would provide a means to ascertain the salaries for the positions covered by these Acts so as to preserve the pay relationship between these positions and the other government employees whose pay is determined on a comparability basis with private employment and annually adjusted for the cost of living.

Appellant, furthermore, cites no case to support his argument that "ascertained" means *only* fixed by specific dollar amount. Indeed, the two cases he cites do not even suggest that the provisions in statutes in question are not valid. In *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937), this Court held that the constitutional requirement that no money could be paid out of the Treasury unless it had been appropriated by an Act of Congress does not require even that the Act of Congress specify with exactitude uses to which the appropriated money is to be put. And *Cain v. United States*, 73 F.Supp. 1019, 1021 (N.D.Ill. 1947), which appellant cites as an analogy for his point that a specific statute is required, does not support him because it deals only with the situation in which there was no statute which vested in the courts of law the appointment of inferior officers. Compare *Surowitz v. United States*, 80 F.Supp. 716 (S.D.N.Y. 1948), in which there was a statute authorizing the heads of departments to appoint such numbers of employees of the various classes recognized by statute as may be appropriated for the Congress.

Plaintiff's rationale would even jeopardize the action of Congress in appropriating by law such amounts of money from the Treasury "as may be necessary" to pay claims against the Federal Government ascer-

tained by the courts and certified by the Comptroller General. 31 U.S.C. § 724a.

**B. The "Necessary and Proper" Clause Vests Discretion in Congress to Select the Means to Execute Its Powers**

Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it has been established that the "necessary and proper" clause allows Congress discretion in selecting the means to carry into execution any power the Constitution confers on Congress, so that all means which are appropriate and plainly adopted to that end, and are not prohibited, are constitutional, if the end is legitimate and within the scope of the Constitution. *Id.* at 421. As the court below pointed out, "our founders sought to preserve in the Constitution a flexible approach to government that would facilitate accommodation to changing conditions and experience" (J.S. App. 10a). The selection by Congress of the method established by the Salary Act and the Adjustment Act for ascertaining federal salaries was clearly an attempt based upon the needs of a constantly growing federal government to provide a more orderly and fair manner for determining such salaries. It grew out of dissatisfaction with the inadequacies of the previous method.

Appellant, however, while conceding that the "necessary and proper" clause "allows Congress discretion *vis-a-vis* the means by which the power granted it by the Constitution are to be carried out" (J.S. 20), asserts that "there have been no changes in our society which presage a need for altering the process of setting salary rates for Senators and Representatives" (J.S. 29). Therefore, appellant seeks to have this Court preclude Congress from changing its choice of means or

methods based upon experience with the means or methods previously chosen.

However, to adequately carry into execution the various powers vested in Congress, it cannot be more clear, as this Court said in *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805), that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution." More recently, in *Buckley v. Valeo*, 424 U.S. 1, 91 (1976), this Court also pointed out that: "Whether the chosen means appear 'bad,' 'wise,' or 'unworkable' to us is irrelevant; Congress has concluded that the means are 'necessary and proper' to promote the general welfare, and we thus decline to find this legislation without the grant of power in Art. I, § 8."

**C. Neither of the Challenged Statutes Contravene the Constitution**

The statutes challenged by appellant were enacted by Congress to provide a more regular and fair method of adjusting higher level federal salaries than the *ad hoc* method previously used. The Salary Act provides for a quadrennial review of such salaries by a Commission appointed for that purpose. The review is to include both the pay levels and the relationships between and among the legislative, judicial and executive positions and the positions covered by the General Schedule. The Commission reports its recommendations to the President who, in the next budget he transmits to Congress, submits his own recommendations. Either House of Congress can reject the President's recommendations. The specific procedure for their approval or disapproval by Congress is established by the Bartlett Amendment. Under the Adjustment Act,

specific annual cost-of-living salary adjustments are mandated unless the President submits an alternative plan which either House of Congress can reject. The rejection by Congress of the President's recommendations and proposals has been called the "legislative veto." By using it, Congress retains control, and the right of either House, under the bicameral system, to reject a change in the status quo is preserved.

The arguments advanced by appellant in opposition to the legislative veto provisions in the challenged statutes—(1) that an affirmative Act of Congress is required to ascertain congressional salaries by dollar amount, (2) that the American voters have no record of their Senators' and Representatives' stand on a proposed salary increase, and (3) that the parliamentary procedure is inadequate (J.S. 24-25)—were correctly rejected by the court below when it found that the challenged statutory procedures for ascertaining congressional pay did not contravene the Constitution. First, the Constitution does not prohibit the use of a method for ascertainment by a statutory formula which allows either House to reject a recommendation or proposal to change the status quo. Second, voice votes, rather than record votes, may be taken in either House. And third, no Member of Congress has a constitutional right to have a bill he favors voted on by the House of which he is a Member.

The lower court also correctly found that the Bartlett Amendment had no effect on appellant's claims that pay adjustments under the Salary Act and the Adjustment Act contravene the Constitution. The amendment does, however, significantly dilute the importance of this case by eliminating appellant's major

arguments opposing the Salary Act procedure. So far as the Adjustment Act is concerned, appellant's argument is even weaker because the statutorily mandated salary increases automatically become effective unless the President submits an alternative plan. Only the alternative plan is subject to a legislative veto, and the President has submitted no alternative plans. Thus, the provision in the Adjustment Act for a legislative veto is not even an issue in this case.

Appellant is correct that this case, which involves the ascertainment of congressional pay pursuant to Article I, Section 6, is distinguishable from *Atkins, et al., v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *petition for cert. filed*, 46 U.S.L.W. 3055 (U.S. Aug. 8, 1977) (No. 77-214), which asserts a challenge to the legislative veto provision as it applies to the ascertainment of judicial pay rates. This case is also distinguishable in that appellant sues as a citizen, taxpayer and Member of Congress to enjoin increases in compensation under the challenged procedures, while the plaintiffs in *Atkins* attack the rejection of a proposed increase in judicial salaries under the challenged procedure. However, appellant is incorrect in suggesting that this case and *Atkins* necessarily present the legislative veto issue to this Court for decision (J.S. 32). It is not necessary to reach the question of constitutionality of the legislative veto in a claim for a salary increase under the Salary Act, such as *Atkins*, because the claim fails whether or not the legislative veto provision is unconstitutional if the provision is inseverable from the remainder of the pay adjustment scheme. *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3243 (U.S. Sept. 28, 1977) (No. 77-486). Thus, *Atkins* turns on the issue of

severability, and this case turns on the meaning of "ascertained by law."

Therefore, appellant's argument with respect to severability relates only to the impact of a determination by this Court that the challenged procedure is unconstitutional. He argues that the determination of non-congressional salaries is "readily severable" from the ascertainment of congressional salaries (J.S. 31).<sup>6</sup> This claim is clearly not supported by the legislative history or the express language of the statutes. The Salary Act specifically provides that the quadrennial review by the Commission "shall be made for the purpose of determining and providing—

- (i) the appropriate pay levels and relationships *between and among* the respective offices and positions covered by such review [Members of Con-

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<sup>6</sup> Appellant does not contend that the legislative veto provisions in the statutes he attacks are severable from the statutory scheme. The argument that the legislative veto provision is severable was expressly considered, however, and rejected by the Fourth Circuit in *McCorkle v. United States*, 559 F.2d 1258, 1262 (4th Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3243 (U.S. Sept. 28, 1977) (No. 77-486). The court said:

Voiding the one-house veto as unconstitutional while leaving presidential authority intact would increase the President's power over salaries far beyond the intention of Congress. We are satisfied that the legislative history establishes that Congress would not have delegated authority to the President to establish salaries without the provision for the one-house veto. Thus, § 359(1)(B) creating the veto is inseparable from those parts of the statute that empower the President to make potentially binding recommendations.

Therefore, the court held that the plaintiffs in that case could not prevail in their attack on the Salary Act because, if the one house veto provision was unconstitutional, the entire statutory scheme for raising salaries fell and, if the legislative veto provision was constitutional, the plaintiffs had been properly denied the salary increases they sought.

gress, judges, and higher-level positions in the legislative, judicial, and executive branches] and

- (ii) the appropriate pay relationships *between* such offices and positions *and* the offices and positions subject to the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, relating to classification and General Schedule pay rates [other federal employees]", (2 U.S.C. § 356, J.S. App. 30a) (emphasis added).

The Adjustment Act also specifically addresses the intention of Congress to treat congressional and non-congressional pay on a comparability basis for the positions covered by the Act. The Senate Report,<sup>7</sup> for example, states:

Section 204 . . . the pay of the affected Members, officials and employees [of the legislative branch] would be adjusted under the *same* formula used for the Executive Salary Schedule.

Section 205 relates to the salaries in the judicial branch, which also would be adjusted under a formula *identical* to that used for the Executive Salary Schedule (emphasis added).

The legislative intent is express, therefore, that Congress intended the salaries of Members of Congress, judges and higher level executive, legislative and judicial branch officials be determined together as part of a single plan.

The court below was correct, therefore, in holding that the methods chosen by the Congress in the Salary Act and the Adjustment Act ascertained the compensation of Senators and Representatives by law, that these

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<sup>7</sup> S.Rep. No. 333, 94th Cong., 1st Sess., reprinted in [1975] U.S. Code Cong. & Ad. News 845.

statutes are not prohibited by Article I, Section 6, and that insofar as they govern the ascertainment of congressional compensation, they do not contravene the Constitution.

#### CONCLUSION

For the reasons stated above, this appeal should be dismissed for lack of justiciability because of appellant's lack of standing and the presence of a political question.

Alternatively, for the reasons expressed in Part II of the opinion below (J.S. App. 8a-10a), the decision below should be affirmed.

Respectfully submitted,

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